

THE LEGALITIES OF MANDATORY COVID-19 VACCINATION AT UNIVERSITIES: LESSONS TO BE LEARNT FROM

Klaassen v Trustees of Indiana University
(No. 1:21-CV-238 DRL, N.D. Ind.)

1 Introduction

The Covid-19 pandemic, which started in Wuhan, China, in December 2019, has continued to wreak havoc and has changed humanity forever. The Higher Education sector, like many others, has not been spared. In an effort to save the academic year and ensure that some teaching and learning could take place in a safe and secure environment, many tertiary institutions in South Africa and other parts of the world transitioned to online education (Le Grange "Could the COVID-19 Pandemic Accelerate the Uberfication of the University?" 2020 *South African Journal of Higher Education* 10). There is no doubt that online learning promotes rich learning and understanding, and it is an effective modality for teaching both concepts and skills in most disciplines (Khalil, Mansour and Fadda "The Sudden Transition to Synchronized Online Learning During the COVID-19 Pandemic in Saudi Arabia: A Qualitative Study Exploring Medical Students' Perspectives" 2020 *BMC Med Educ* 285). Online education has enabled many tertiary institutions to become innovative in the way students learn and academics teach, while also overcoming the constraints of space, time and distance (McCrimmon, Vickers and Parish "Online Clinical Legal Education: Challenging the Traditional Model" 2016 *International Journal of Clinical Legal Education* 565). However, the shift to remote learning has also unmasked historical, geospatial and economic inequalities that permeate the world in which students live (Czerniewicz, Agherdien, Badenhorst, Belluigi, Chambers, Chili, De Villiers, Felix, Gachago, Gokhale, Ivala, Kramm, Madiba, Mistri, Mgqwashu, Pallitt, Prinsloo, Solomon, Strydom, Swanepoel, Waghid and Widing "A Wake-Up Call: Equity, Inequality and Covid-19 Emergency Remote Teaching and Learning" 2020 *Postdigit Sci Educ* 946). Challenges include the digital divide, lack of technical support, poor learning environments, conditions at home, and lack of assets (among others), resulting in many student organisations in Africa and South Africa rejecting online teaching, with some viewing it as "an unaffordable, impractical and an elitist solution" to COVID-19 (Mukeredzi, Kokutse and Dell "Student Bodies Say E-Learning is Unaffordable and Elitist" (2020) <https://www.universityworldnews.com/post.php?story=20200422075107312> (accessed 2020-11-06)). With the realisation that COVID-19 is here to stay for a while, and many

students complaining about the difficulties posed by online learning from home, it seems inevitable that many universities in South Africa have already or may in future consider expediting the return of students to campus. However, to open fully, universities (like other sectors) may deem it necessary, as part of their planning process, to make it mandatory for all staff and students to be vaccinated. The question that arises then is whether mandatory vaccination in a tertiary setting will pass constitutional muster in a court of law. Students, if required to vaccinate or produce a vaccination card upon entry to campus, may argue that their legal rights, such as their right to bodily integrity, religious freedom and possibly their choice to choose or refuse their medical treatment, may be infringed. South Africa has not yet had to deal with such challenges. However, the US case of *Klaassen v Trustees of Indiana University* (No 1:21-CV-238 DRL ND IND) (*Klaassen*) 1–101, was one of the first cases from a global perspective to deal with such challenges and can provide valuable assistance for South Africa going forward. This case note critically examines the case of *Klaassen*, which is a landmark case dealing with the issue of mandatory vaccinations for students within a university setting. It is hoped that the case will provide guidance to universities in drafting policy documents surrounding mandatory vaccination, as well as in dealing with possible legal challenges in future.

2 *Klaassen*: Facts and legal issues

The case of *Klaassen v Trustees of Indiana University* (*supra*), a 2021 United States federal court case, resulted in one of the first rulings to uphold a vaccine mandate in the public sector (*Klaassen supra* 1–10). Students at the Indiana University were issued with a directive that, as from the start of the new semester, they had to be vaccinated against COVID-19, unless they were exempt for medical or religious reasons (*Klaassen supra* 3). Those students who were exempt for medical or religious reasons had to wear masks and be tested for the disease twice a week if they wanted to attend classes at the University (*Klaassen supra* 3). Eight students contested the decision of the University on the basis that their fundamental rights (bodily integrity, autonomy and medical treatment choice) were being infringed (*Klaassen supra* 3–4). They applied for an injunction to halt the University's Covid-19 vaccine mandate for students (*Klaassen supra* 3–4). The University made it clear that those who failed to comply with the mandate would have their registration cancelled and would also be barred from any campus activities (*Klaassen supra* 3–4). The University's policy made provision for medical and religious exemption. The students argued that the injunction was necessary in order to protect their bodily autonomy, religious freedom, and ability to choose or refuse their medical treatment (*Klaassen supra* 5). The students alleged that continuous wearing of masks, COVID-19 testing and social distancing for the unvaccinated also infringed upon their religious freedom (*Klaassen supra* 5). The students went on to add that the University gave them an ultimatum to choose between taking the vaccine or their tertiary education, and such an ultimatum was unfair (*Klaassen supra* 5). The University argued that the mandate was necessary in order to safeguard students and staff in light of the pandemic crisis (*Klaassen supra* 5). The motion for a preliminary injunction was denied by Judge Leichty in

the federal court. On appeal, the United States Court of Appeals for the Seventh Circuit also followed suit and the vaccination mandate was upheld.

3 Findings of the court in *Klaassen*

The court made it clear that the students could not show that the University's mandate would cause them irreparable harm (*Klaassen supra* 98). The court held that vaccination requirements, like other public health measures have been common in the country as well as institutions of learning (*Klaassen supra* 98). The court found that even though a vaccine mandate fell under emergency use authorisation, the fact that the vaccine had received approval from the Food and Drug Administration created no issue in terms of its use, as there had been a stringent degree of examination (*Klaassen supra* 98). The court held that the students' Fourth Amendment claim must fail as the University had taken reasonable measures to protect a legitimate public health interest (*Klaassen supra* 98). It was not in dispute that the students have the right to choose whether to receive the vaccine, but such a choice must be subject to the State's reasonable measures in attempting to eradicate a dangerous disease. It was held that there was no blanket requirement that all people, or in this case all students be vaccinated (*Klaassen supra* 98). The Indiana University had made provision for exemption for those with medical conditions, or on grounds of religious beliefs (*Klaassen supra* 99). A problem could arise where no provision has been made for students who fall into this category. In the particular case, six of the students had claimed religious exemption and a seventh had been eligible for it. All they had to do was wear masks and be tested, which was not constitutionally problematic. However, the eighth student did not qualify for an exemption, and therefore had to be vaccinated in order to continue studying at the University. The court emphasised that Indiana itself did not require adult citizens to be vaccinated (*Klaassen supra* 99). The COVID-19 vaccination was a condition of attending Indiana University. People (in this case, students) did not have a right to collegiate education, and they had a choice to study elsewhere if they chose not to be vaccinated (*Klaassen supra* 99).

The judge, finding in favour of the University, made it clear that it had acted reasonably at all material times and there was no irreparable harm suffered by the students as a result of the mandate (*Klaassen supra* 99). The University's course of action on insisting on a vaccination programme was in the interest of public health and the University could take reasonable measures such as mandatory vaccinations to protect a public health interest (*Klaassen supra* 99).

4 Lessons to be learnt from *Klaassen*

The judgment highlights that public or state universities have a right to demand that all students be kept safe in a congregate setting (*Klaassen supra* 99). It was also made clear that close contact between people in a university setting is inevitable and vaccinations are extremely important, especially in the education sector, as vaccinations provide protection, not only to the vaccinated persons but also to those who come into contact with

them. Mandatory vaccinations can be considered a reasonable measure to protect a public health interest. Courts are unlikely to make blanket rulings that all people be vaccinated in certain settings. There would be exclusions, such as for medical or religious reasons. However, where human rights violations are called into question, such rights must be measured against the reasonableness of such measures, as in this case, for safeguarding the health interests of the public. The judgment also makes it clear that a policy on mandatory vaccination does amount to an ultimatum to students – to choose between receiving the vaccine and pursuing their studies at the institution (Klaassen *supra* 100). Students have options; they can apply for medical or religious exemption, attend another university or even attend online classes (Klaassen *supra* 100). Universities have the right to make health and safety decisions and such decisions may revolve around keep the majority of students safe in a mass setting (Klaassen *supra* 101).

5 The pros and cons of mandatory vaccination in South Africa

In a recent South African survey conducted in May and June 2021, 54 per cent of South Africans indicated that they were unlikely to get a COVID-19 vaccine and nearly 50 per cent of those surveyed indicated that prayer provided more protection than a vaccine. The Afrobarometer survey obtained the views of 1 600 South Africans (see article by Sguazzin “Most South Africans Don’t Want Covid Shot, Many Rely on Prayer” (28 July 2021) *Bloomberg News* <https://www.bloomberg.com/news/articles/2021-07-28/most-south-africans-dont-want-covid-shot-many-rely-on-prayer/> (accessed 2021-09-03)). Recent media reports suggest that the problem of vaccine supply has now switched to a demand issue where vaccine hesitancy has come to the forefront (Sguazzin <https://www.bloomberg.com/news/articles/2021-07-28/most-south-africans-dont-want-covid-shot-many-rely-on-prayer/>). Vaccine hesitancy seems to be a problem not only in South Africa but worldwide, with many people raising further concerns about a lack of access to trustworthy data and the side effects of COVID-19 vaccines (see National Income Dynamics Study Coronavirus Rapid Mobile Survey (NIDS-CRAM) <http://www.nids.uct.ac.za/about/nids-cram/nids-cram>, a nationally representative survey reflecting the impacts of the COVID-19 pandemic on South African citizens; see also Spaull, Daniels, Ardington, Branson, Breet, Bridgman, Brophy, Burger, Burger, Casale, English, Espi, Hill, Hunt, Ingle, Kerr, Kika-Mistry, Köhler, Kollamparambil, Leibbrandt, Maughan-Brown, Mohohlwane, Nwosu, Oyenubi, Patel, Ranchhod, Shepherd, Stein, Tameris, Tomlinson, Turok, Van der Berg, Visagie, Wills and Wittenberg *Synthesis Report: NIDS-CRAM Wave 5* (8 July 2021) <https://cramsurvey.org/wp-content/uploads/2021/07/1.-Spaull-N.-Daniels-R.-C-et-al.-2021-NIDS-CRAM-Wave-5-Synthesis-Report.pdf>). As a result of vaccine hesitancy, many sectors have called for COVID-19 vaccines to be made mandatory so that the country can re-open and operate similarly to the way it did pre-pandemic. It appears that the ministerial advisory committee is also discussing the possibility of mandatory COVID-19 vaccines for certain groups of people (Farber “Mandatory Jabs Not on Cards Yet, But Experts

Say Pandemic Requires Special Measures” (2021-08-22) *Sunday Times* <http://www.timeslive.co.za/sunday-times/news/2021-08-22-mandatory-jabs-not-on-cards-yet-but-experts-say-pandemic-requires-special-measures/> (accessed 2021-09-04).

In August 2021, Health Minister Joe Phaahla, in his address to the National Council of Provinces (NCOP), said that he is quite certain that many public facilities will soon not be accessible without proof of vaccination. He said:

“Our own preference would be for people to come voluntarily to vaccinate, but as people want more freedoms [such as attending religious ceremonies or entertainment venues] and to access facilities, we are not excluding the considerations of a stage where [the people in charge of those facilities] would have the right to make certain demands.”

The issue of whether an individual’s right to decline a COVID-19 vaccine is more valid than the public interest in protecting and saving lives has now been brought to the forefront. Many medical experts, bioethicists, legal experts and even the average person on the street are expressing strong views about the necessity of mandatory vaccinations. Wits University vaccinology expert, Professor Shabir Madhi, has recently said that normally he is not a fan of mandatory vaccination but COVID-19 makes it necessary (Farber <http://www.timeslive.co.za/sunday-times/news/2021-08-22-mandatory-jabs-not-on-cards-yet-but-experts-say-pandemic-requires-special-measures/>). The Director of the Centre for Medical Ethics and Law at Stellenbosch University, Professor Keymanthri Moodley, has also called for all high-risk environments, occupations and communal activities to develop mandatory vaccine policies (Farber <http://www.timeslive.co.za/sunday-times/news/2021-08-22-mandatory-jabs-not-on-cards-yet-but-experts-say-pandemic-requires-special-measures/>). She added that such policies would be for the common good and in the public interest (Farber <http://www.timeslive.co.za/sunday-times/news/2021-08-22-mandatory-jabs-not-on-cards-yet-but-experts-say-pandemic-requires-special-measures/>). It is obvious that we are not living in normal times and extreme measures may now be necessary.

The crucial question that needs to be asked is whether mandatory vaccination policies will pass legal and constitutional muster. Many South Africans will argue that the Constitution of South Africa safeguards their basic human rights. If they are forced to take the COVID-19 vaccine, the right to bodily integrity, religious freedom and possibly their choice to choose or refuse their medical treatment may be infringed. However, it must be remembered that rights are not absolute and may be limited in certain circumstances. Section 36 of the South African Constitution (referred to as the limitation clause) requires that any limitation of a human right contained in the Bill of Rights must be “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”. Any restriction in terms of section 36 must be proportional to the purpose of the limitation and not be arbitrary, discriminatory or unreasonable. There is an argument that the Constitution demands that the least restrictive means must be employed when limiting rights and that a vaccine mandate is not the least restrictive means to protect public health from COVID-19 (Thaldar and

Shozi “Mandatory COVID-19 Vaccine Policy Not Best Option” (2021) *The Conversation* <https://www.news24.com/opinions/analysis/analysis-donrich-thaldar-boginkosi-shozi-mandatory-covid-19-vaccine-policy/> (accessed 2021-09-06)). Those against mandatory vaccination feel that policy options such as incentive schemes, money awards, lotteries and discounted food items (among others) could be explored before making vaccines mandatory (Thaldar and Shozi <http://com/news24/analysis-donrich-thaldar-boginkosi-shozi-mandatory-covid-19-vaccine-policy/>). However, there is no evidence to suggest that such incentive policies will be successful in increasing vaccination numbers or changing the mindset of those who are against vaccination. However, the case of *Klaassen* could provide valuable insight into how South African courts might decide on the matter should the issue of infringement of human rights be raised in the coming months. The court in *Klaassen* was clear that the University’s course of action (insisting on a vaccination programme) was in the interest of public health and stated that the University was at liberty to take reasonable measures such as imposing mandatory vaccinations to protect a public health interest. Against a backdrop of curbing the dangerous airborne disease and saving lives, the requirement of reasonableness will be satisfied, in particular because vaccines are being administered globally, the majority of deaths worldwide is occurring among those who have not been vaccinated, and research and current data confirm its safety among the majority (Moodley “Why COVID-19 Vaccines Should Be Mandatory in South Africa” (2021) *The Conversation* <http://www.google.com/amp/why-covid-19-vaccines-should-be-mandatory-in-south-africa-165682/> (accessed 2021-09-06)). It cannot be said that an individual’s right to refuse the vaccine is more valid than the public interest in saving lives and curbing the spread of the disease.

It is clear that COVID-19 vaccinations have been administered globally, with scientific data and evidence backing up its importance in fighting and curbing the spread of the virus. According to Moodley, vaccine mandates are justifiable on multiple levels, based on the common good and a public health ethics framework that aims to save lives, use limited resources efficiently and build public trust (Moodley <http://www.google.com/amp/why-covid-19-vaccines-should-be-mandatory-in-south-africa-165682/>). However, against this backdrop, arguments against mandatory vaccination such as government’s slow roll-out process, the existence of a climate of vaccine hesitancy, the lack of trust, existing conspiracy theories and concerns about side effects still continue to loom large.

6 The current regulatory framework in South Africa

There is no clear legislative framework governing mandatory vaccination in South Africa. However, should any person deliberately or intentionally expose another to COVID-19, such person may face criminal sanction. Regulation 14(3) of the regulations issued in terms of the Disaster Management Act (GN R480 in GG 43258 of 2020-04-29 in terms of Act 57 of 2002) states, any person “who intentionally exposes another person to COVID-19 may be prosecuted for an offence, including assault, attempted

murder or murder". The injured party may also institute a separate civil claim for damages.

Interestingly, the government seems to have left the door open to mandatory vaccination. In the workplace, mandatory vaccination may be considered alongside labour legislation such as the Labour Relations Act (66 of 1995), the Occupational Health and Safety Act (95 of 1993), the Employment Equity Act (55 of 1998), and the Basic Conditions of Employment Act (75 of 1997). In addition, a new Consolidated Direction on Occupational Health and Safety Measures was published by government on the 11 June 2021, which requires that employers in certain workplaces conduct a risk assessment that focuses on the operational requirements of the business and whether there is an intention to make vaccination mandatory (see discussion by Gwala and Matavire "Mandatory Vaccination: Which Way Will SA Go?" (2021) *Health E News* <https://health-e.org.za/2021/09/02/mandatoryvaccination-which-way-will-sa-go/> (accessed 2021-09-05)). However, in developing workplace policies, employers must not only take into account the operational requirements of the business, but also the risk posed by an employee to others, the constitutional rights of employees, medical grounds for not taking the vaccine such as allergic reactions, and a working environment that is safe (see s 8 and 9 of the Occupational Health and Safety Act 85 of 1993). Section 24(a) of the Constitution states that "everyone is entitled to an environment that is not harmful to their health or well-being" while section 23 of the Constitution states that "everyone has the right to fair labour practices" (Moodley <http://www.google.com/amp/why-covid-19-vaccines-should-be-mandatory-in-south-africa-165682/>). Even though employees may challenge mandatory vaccination policies at the workplace, such a policy could be regarded as a fair labour practice if the safety of its employees is at risk. Employees who are vaccinated may also argue they have a right to a safe working environment, and may legitimately object to having unvaccinated employees within close proximity at the workplace (Dhai "To Vaccinate or Not to Vaccinate: Mandatory COVID-19 Vaccination in the Workplace" 2021 *S Afr Journal of Bioethics Law* 42). In terms of the National Health Act (61 of 2003), employees should understand the implications, risks and obligations of a refusal to engage in health services and this could include job loss or other punitive measures (Dhai 2021 *S Afr Journal of Bioethics Law* 42). If refusal to take the vaccine poses an extreme risk to public health, the protection of individual rights will not trump the public good.

7 Conclusion

The head of the Health Justice Initiative recently said, "We are in a global pandemic and vaccines saves lives" (see discussion by Gwala and Matavire <https://health-e.org.za/2021/09/02/mandatory-vaccination-which-way-will-sa-go/>). There is no doubt that successful vaccination programmes are extremely important, especially in the education sector as they provide protection, not only to the vaccinated person but also to those who come into contact with them. The highly contagious delta variant and the decrease in vaccination intake has forced many countries to make vaccination mandatory and countries such as Australia, the UK, Greece, Kazakhstan,

Saudi Arabia, Russia, Canada, France and the USA, among others, have already made vaccines mandatory for certain groups and sectors (Dhai 2021 *S Afr Journal of Bioethics Law* 42). History points to the fact that mandatory vaccine laws and policies have effectively managed to eradicate pandemics in the past, especially in the early 1900s in the United States, where mandatory vaccination laws have been credited with eradicating smallpox in most areas (Farber <http://www.timeslive.co.za/sunday-times/news/2021-08-22-mandatory-jabs-not-on-cards-yet-but-experts-say-pandemic-requires-special-measures/>). We have reached a stage where drastic measures must be taken to save lives and stop the spread of the current contagion. The landmark case of *Klaassen* indicates clearly that personal rights do not trump public health interests and courts will always lean towards furthering public good. Although the case of *Klaassen* is not binding on South African courts, it does provide some direction on how South African courts may rule in terms of mandatory vaccination cases. The clarion call for students to start returning to in-person classes is growing louder and the “mandatory COVID-19 vaccination of staff and students at universities must be considered as an option for the safe repatriation of students back to campuses” (Sibanda “Should SA Varsities Consider Mandatory COVID-19 Vaccine Policies?” (2021) opinion@news24.com (accessed 2021-09-06)). University mandates are becoming commonplace in many other countries, and already students in countries such as the USA and Canada are required to provide proof of vaccination in terms of policy requirements (Sibanda opinion@news24.com). From a South African perspective, a mandatory vaccination policy at tertiary institutions may be the only option for the return to some level of normality in the future.

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